DISCUSSION PAPER

CLARIFYING THE LIABILITY OF SECURED CREDITORS

TO: *ASSISTANT DEPUTY MINISTER*
POLICY DIVISION
MINISTRY OF ENVIRONMENT & ENERGY

FROM: *LENDER LIABILITY WORKING GROUP*

March 17, 1995

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1.0 INTRODUCTION

1.1 Purpose and Structure of Report

Due to the magnitude of concern with the issue of lender liability, the Honourable C. J. (Bud) Wildman, Minister of Environment and Energy announced in June 1993 the creation of a multi-stakeholder Working Group to provide advice on practical ways to achieve greater certainty for lenders.

This report discusses issues relating to the liability of lenders for clean-up of contaminated sites and makes a series of recommendations. The recommendations are intended as advice to aid the Ministry in possible future revisions to environmental legislation. They could also be used as a basis for further consultation.

This report is divided into 4 sections. This section provides an introduction to the policy context for this exercise, describes the Working Group and its products and summarizes the recommendations. Section 2 describes the recommendations from the Working Group in full. Section 3 presents an overview of key issues on which the Working Group recommends MOEE undertake broader-based consultation. Section four provides a conclusion.

1.2 Policy Context

Determining responsibility for clean-up of contaminated sites presents a significant financial and policy challenge to governments across Canada. The financial services sector, banking community, development industry, private corporations, environmental organizations, as well as the public, have pressed for policy and regulatory reform to create clearer rules governing liability for clean-up of contaminated sites.

In the absence of clear, consistent rules on environmental liability, lenders have sometimes been reluctant to extend credit to businesses or realize on their existing loans for fear of attracting environmental liability. This uncertainty impacts on more than lenders and other secured creditors as it results in the following:

1. Contaminated properties are abandoned as lenders sometimes decline to realize on their security interest with the result that provinces or municipalities may become financially responsible for clean-up;

2. As lenders are wary of potential liability, industry finds it difficult to obtain credit and/or insurance creating "investment chill" which can reduce provincial economic activity; and,

3. Development is encouraged in uncontaminated "green-field" areas, resulting in urban sprawl, as potentially useful contaminated sites are abandoned. Many industrial sites are not being redeveloped, although they are in areas that are ideal for industrial and residential redevelopment.

Recognizing these issues, in March 1993, the Canadian Council of Minister's of the Environment (CCME) "endorsed-in-principle" the recommendations of the CCME Task Force on environmental liability in the report entitled *Contaminated Site Liability*. The report recommends thirteen principles as a model framework for a consistent approach to the issue of environmental liability across Canada and explicitly calls for a "conditional exemption" for lenders from exposure to liability. The report recommends that lenders not be liable for clean-up, beyond the outstanding balance of the debt, unless the lender had "actual involvement in the control or management of the business of the borrower".

In Ontario, under the Ontario *Environmental Protection Act (EPA)* and the Ontario *Water Resources Act (WRA)* parties are liable if they (1) are owners; (2) cause or aggravate an environmental problem; or, (3) enter into "charge, management or control" of a property. Activities that lenders normally undertake as lenders, however, should not bring lenders into the definition of "ownership", "management" or "control". Lenders can also be owners. Banks, for example often own large real estate portfolios. As owners, lenders are liable to the same extent as any other owner. Difficulties arise in determining when lenders cross the line between merely lending and exercising indicia of ownership or "charge, management or control" since the law does not define these activities precisely.

Recognizing this ambiguity, the Ontario Ministry of Environment and Energy (MOEE) currently enters into individually negotiated agreements with some lenders wishing to realize on collateral security provided by a non-solvent debtor. These agreements help clarify the actions lenders can undertake without being considered liable. In 1994, Ministry staff negotiated over 60 separate agreements with lending institutions. However, this practice is time-consuming, and costly to both government and the private sector. As agreements are negotiated on an individual basis, inequities can occur.

In response to these issues, the Ministry set up a Working Group to provide advice on the liability of lenders.

1.3 Lender Liability Working Group

The Lender Liability Working Group began work in August 1993. During Phase I, the Working Group produced a report of the key policy issues to be addressed in clarifying lender liability.

This is the final report from the Working Group and it contains recommendations and options for short and medium-term actions developed during Phase II. Specifically, the Working Group has worked to produce two key products:

1. This joint MOEE/private sector report providing advice on principles on which to base future revisions to the *EPA* to govern and clarify lender liability; and,

2. A Standard Agreement to streamline the current MOEE practise of individually negotiated agreements with lenders for each property in cases of insolvency.

Further, MOEE has worked internally to develop a *Guideline For Insolvencies and Abandoned Sites* to provide guidance to operations staff on how to handle situations involving insolvencies or abandonment of sites. The Guideline will improve the Ministry's timeliness and consistency in handling cases of abandoned sites.

The Terms of Reference for the Working Group appear in Appendix A of this Report.

1.4 Working Group Membership

The initial membership of the Working Group included the financial services sector, environmental groups, members of industry and government and is contained in Appendix A. Two notable changes in participation occurred during Phase II of the initiative:

1. The Environmental Community representatives withdrew from the exercise; and,

2. Due to their interest in liability issues, farm organizations, through the Ontario Federation of Agriculture, were invited to participate on the Working Group.

The environmental representatives withdrew from discussions as they felt that the process being coordinated by MOEE did not constitute sufficient consultation and that MOEE should undertake a holistic review of environmental issues and not deal with the issue of lender liability in isolation. Given these concerns, the environmental community did not feel this an initiative on which to focus their over-extended resources.

Industry representatives on the Working Group, not directly involved in providing credit, have not taken a position on this document and have participated as interested observers to: (1) help facilitate the redevelopment of contaminated sites; and, (2) ensure that the recommendations do not negatively affect the potential liability of industry.

The Working Group has agreed not to make recommendations on issues which, due to their impact on other stakeholders, require broader consultation.

1.5 Summary of Key Recommendations

The **three key recommendations** of the Working Group are:

1. The Ministry adopt the detailed list of principles contained in Section 2.1 of this report to address concerns raised by the potential environmental liability of lenders. These principles clarify the circumstances under which lenders should be considered potentially responsible persons under environmental statutes. Specifically, the principles provide that:

    - Lenders should not be considered liable under environmental legislation where they only take such steps with regard to property as are necessary to protect their security or recover on their loans;

    - Lenders should be liable for environmental problems which they cause or aggravate, and should be liable where they have taken steps with regard to property or undertakings beyond that which is necessary to protect their security or recover on their loans;

    - Lenders, as owners of their own property, will continue to be responsible for environmental problems to the same extent as other owners;

- Activities by lenders that are ordinarily necessary to protect their security or recover on their loans should be specifically identified in statutes and regulations to the extent possible; and,

- The Crown should be able to recover public expenditures so that creditors and persons who buy contaminated land do not make windfall gains as a result of environmental clean-ups undertaken by the Crown at public expense.

2. The Ministry implement a "Standard Agreement" with the Lending Community to streamline the current practice of individually negotiating agreements for properties.

3. The Ministry undertake broader consultation on a number of issues which the Working Group identified as relevant to the potential environmental liability of lenders, but which also affect other stakeholders not represented on the Working Group. These issues include:

   - Clarifying the meaning of statutory language used to establish who are "potentially responsible persons". This would include, for example, clarifying the meaning of language found in the *EPA* which describes potentially responsible persons as having "charge, management, and control" of a source of contaminant, or having "caused or permitted" the discharge of a contaminant;

   - Developing a regime for allocating liability among potentially responsible persons including the possible use of Alternative Dispute Resolution (ADR) procedures. Discussion should include consideration of "orphan sites", "orphan shares" of a site and the allocation of liability on a "joint and several" basis;

   - Establishing a registry system to alert prospective purchasers and users about environmental problems existing at a property; and,

   - Creating mechanisms for recovering or protecting against future crown expenses for clean-up.

2.0 RECOMMENDATIONS

This section of the Report describes the first two recommendations of the Working Group in full:

1. That the Ministry endorse the set of "Rules" or "Principles" developed by the Working Group to provide the basis for further policy work to clarify the liability of lenders in Ontario; and,

2. The Ministry implement a Standard Agreement with lending institutions to streamline the current MOEE practise of individually negotiated agreements with lenders.

2.1 Principles & Rules

The Working Group has developed "rules" or "principles" to clarify lender liability which it recommends guide any future reform of environmental laws. The rules act to clarify who is a creditor, determining when creditors are responsible persons, identifying limits to the potential liability of creditors and identifying the responsibilities of creditors under environmental legislation. This section of the Report presents the rules developed by the Group and describes the policy context and implications of the recommended principles. The Working Group acknowledges that these principles should be consistent with the *Bankruptcy and Insolvency Act of Canada* (*BIAC*) and some revision may be required based on amendments made to the *BIAC*.

To whom does this clarification apply?

Principle #1

The proposed clarification would apply to secured creditors and any other creditors who acquire a right to deal with property, while they are acting as creditors.

Similar clarification would also apply to certain other persons such as trustees and fiduciaries.

These rules have been designed for "secured creditors". Secured creditors include chartered banks, trust companies in their role as lenders or trustees for lenders, insurance companies in their role as lenders, and any institutions or parties who have a secured interest in a property or operation. This report often uses the terms creditors, secured creditors and lenders interchangeably.

Clarification afforded by these rules would only apply to creditors while they are acting as creditors, and not while they are acting in some other capacity. Specifically, these rules have been crafted to clarify potential liability when a secured creditor either takes steps necessary and customary to protect their interests as a creditor or realize on secured credit. The rules would also apply to agents and employees of creditors, while they are acting in that capacity.

The Working Group recommends that, if legislative amendment is proposed, similar rules be developed for other persons with a special relationship to a property, such as trustees or other fiduciaries.

How should Ontario environmental legislation be clarified with regard to secured creditors?

Principle #2

Environmental legislation should, to the extent possible, define when creditors will be responsible for environmental problems, when the responsibility of creditors for environmental problems will be limited, and what the conditions and scope of this limited responsibility should be. The legislation should also make it possible to respond to unanticipated situations by means of prescribing or exempting regulations.

The Working Group recommended that lenders be potentially responsible parties when, and only when, they:

1. Are "owners", not merely as a step in realizing on secured credit;
2. Cause or aggravate an environmental problem; or,
3. Enter into "charge, management or control" of a property, beyond the extent necessary and customary to protect their interests as a creditor or realize on secured credit.

The concern raised by the Working Group was the current ambiguity as to whether actions taken by lenders to protect or realize on secured credit would

make them liable under the definition of "charge management or control". The Working Group did agree that where lenders do take control of a property beyond what is required to protect their security or recover on their loans, lenders will be responsible for environmental problems at, or related to, the property.

When should creditors not be liable for environmental problems?

Principle #3

Creditors would not be responsible under environmental legislation merely because they hold security interest or similar interest in property and only do certain things which creditors ordinarily do to protect their security and/or recover on their loan.

Principle #4

Creditors that do not cause or aggravate environmental problems, that are not owners of the subject property, and who do not take steps that result in them acting in some capacity other than as creditors, will not be personally responsible for environmental problems.

Uncertainty about the steps or activities which can result in lenders becoming "owners" or persons who have "charge, management or control" and, therefore, that can result in lenders becoming potentially responsible persons, has impeded lenders from engaging in what are otherwise ordinary practices to protect their security or to recover on their loans.

Such ordinary practices result not only in significant economic benefits, but also in significant environmental benefits. For example, the orderly winding down of businesses can mean that lenders take steps to secure and stabilize sites, in order to protect the potential value of the security, and the ultimate transfer of properties and businesses to new purchasers ensures that environmental problems will be addressed.

Recognizing that the lack of a definition for "charge, management or control", "owner", and "cause", "aggravate" or "permit" creates uncertainty for lenders performing these tasks which they ordinarily do to recover on their loans, the

Working Group recommends that future legislative amendment clarify and define these terms.

The Working Group acknowledged that the legal terms currently employed to describe who is potentially liable for clean-up would not necessarily have to change, but clarification is required on actions "ordinarily necessary" to protect lender's security. Clarification is required on (1) the steps that can be taken to realize on secured credit, without risk of potential liability, such as taking possession, selling and/or taking title, and (2) the activities that can normally be undertaken by a lender to protect its interests as a creditor or realize on secured credit. The issue of definitions is discussed in more detail in Section 3.1.

The following are activities which the Working Group felt are ordinarily undertaken by creditors to protect their security and recover on their loan:

1. Investigating a site, including conducting an environmental site assessment;
2. Requiring compliance with applicable laws;
3. Auditing financial records;
4. Undertaking emergency repairs;
5. Paying taxes or utilities;
6. Providing security at a property or,
7. Providing financial advice.

A more detailed listing and description of activities for which creditors should be able to undertake without being potentially responsible are listed in Appendix B. As the list contains general phrases such as "other activities", the list would have to be made more specific if incorporated into legislation to ensure that the provisions are not unintentionally broad or narrow. Amended legislation should also make it possible to respond to unanticipated situations by means of prescribing or exempting regulations.

When are creditors responsible for environmental problems?

Principle #5

Creditors are responsible for environmental problems where they cause or aggravate environmental problems or where they take control of contaminated properties or businesses responsible for the contamination beyond that which is contemplated under principle #3.

What are the responsibilities of creditors under the proposed regime?

Principle #6

Where creditors take action to recover on their loans, they will be required to take certain specified steps. If creditors fail to take such steps, they will be personally responsible for environmental problems that arise as a result of the failure.

Some members of the Working Group supported the idea that certain obligations could be legislatively assigned to lenders where they take action to recover on their loans. This principle does not apply to those actions that creditors take to protect their security during the term of a loan. Several members of the Working Group felt that these requirements on lenders went beyond requirements of other parties who may be potentially liable and should be discussed in relation to additional requirements on non-lenders and within broader consultation on amendment to the *EPA*.

The Working Group did, however, provide a few suggestions for potential steps that should be required by law of lenders when, in the absence of an owner, they act to recover on secured credit:

1. Where a creditor operates a business, the creditor will be responsible for ensuring day-to-day compliance with environmental laws;

2. Provide notice of significant environmental problems to appropriate public authorities as prescribed by law, including where creditors conduct a study or otherwise obtain information about significant environmental problems at a property;

3. Creditors shall not abandon properties where there are significant environmental problems until they have notified appropriate public authorities of these problems; and,

4. Where there are significant environmental problems, creditors should take appropriate steps to control access to property to prevent acts of vandalism and the associated unlawful discharge of contaminants. The nature of the "appropriate steps" will vary with the location of the property and the type of environmental problem at the property. Responsibilities for providing security would end when a creditor is no longer active with a property.

The Working Group recommends that these suggestions be reviewed in the context of broader consultation.

Should the crown be able to recover public expenditures for clean ups?

Principle #7

The Crown should be able to recover public expenditures so that creditors and persons who buy contaminated land do not make windfall gains as a result of environmental clean- ups undertaken by the Crown at public expense.

The Working Group recognized that any legislative reforms should ensure that lenders (and others) are not put in a position where they may gain windfall benefits as a result of environmental clean-ups undertaken by the Crown at public expense. While various mechanisms for achieving this principle were discussed by the Working Group, members of the Working Group were unable to reach agreement as to a preferred mechanism and recommend that this issue and associated issues such as "orphan sites" and "orphan shares" undergo broader consultation. The issue is discussed more fully in Section 3.5.

2.2 Standard Agreement

Over the past four years, the MOEE and lenders have entered into agreements which provide lenders with certain assurances about the scope of their potential environmental liability for properties on which lenders hold security and want to realize.

The agreements do not protect lenders from prosecution where they have violated environmental laws, or where environmental problems are caused or aggravated. The agreements also do not affect the rights of third parties under statute or common law.

In 1994, Ministry staff negotiated over 60 separate agreements with lending institutions. However, this practice is time-consuming, and costly to both government and the private sector. As agreements are negotiated on an individual basis, inequities can occur.

To streamline the process of developing these agreements, MOEE and lenders have attempted to develop a Standard Agreement, which could apply to all

properties in which a lender has security. One of the main purposes of the Standard Agreement is to clarify that lenders can undertake environmental evaluations for the purposes of determining the condition on a site without becoming liable for clean-up of historical contamination. In return for clarified liability, lenders would be required, when requested by MOEE, to share evaluations with the Ministry.

A Standard Agreement would be guided and limited by the current legislative regime and works to clarify lender liability. However, further changes in the fundamental liability regime can only result through regulatory amendment to the *EPA* which would go further to define and clarify the liability of lenders.

3.0 ISSUES FOR BROADER-BASED CONSULTATION

In addition to the specific recommendations made in the last section regarding lender liability, the Working Group discussed a number of issues which touch on lender liability and which are germane to a broader group of stakeholders. The following is a list of the key policy issues that the Working Group recommends undergo broader-based consultation:

1. Need for greater clarity and clearer definitions;
2. Joint and several liability - What does it mean, how does it apply?;
3. Environmental registry;
4. Contiguous properties; and
5. Recovering and protecting against future crown expenses for clean-up.

3.1 Definitions

Under the Ontario *Environmental Protection Act* parties are liable for environmental problems if they:

1. Are, or have been, "owners";
2. "Caused or permitted" or aggravated an environmental problem; or,
3. Enter into "charge, management or control" of a property.

Lenders have argued that the absence of clear rules for defining, for example, "owner", "charge, control or management" has resulted in uncertainty about when lenders may become potentially responsible under environmental legislation.

During Phase I, the Working Group discussed options for developing clear rules for defining terms such as "owner" or "charge, control and management" of a source of contaminant. As part of these discussions, the Working Group reviewed provisions enacted in other jurisdictions. In particular, the Working Group conducted a review of provisions found in the Alberta *Environmental Protection and Enhancement Act*, the British Columbia *Waste Management Amendment Act* (1993), and the U.S. *CERCLA*. During Phase II, the Working Group has focused its efforts on developing a set of principles to clarify the potential liability of lenders under environmental laws.

Although discussions involving the definition of terms used to identify potentially responsible persons proved to be productive, the Working Group concluded that recommendations relating to these definitions could impact upon a larger group of stakeholders than were represented in the Working Group, and therefore should be made after broader consultation. The Working Group recognized that numerous issues relating to "potentially responsible parties", such as retrospective and prospective liability, funding options, trust funds, changing environmental standards or "moving goalposts", orphan sites and orphan shares, would also require discussion with a wider advisory body.

3.2 Joint & Several Liability

A "joint and several" liability regime means that any person who is considered liable under environmental legislation can be held responsible for the entire clean-up cost, regardless of the extent to which that person has contributed to the contamination.

MOEE entered into the Lender Liability exercise explicitly stating that it was not prepared to amend the legislation and remove the potential for joint and several liability. The Environmental Non-Government Organizations (ENGOs) represented on the committee (during Phase I), as well as some other members of the Working Group, supported MOEE's approach in this respect.

Some members of the Working Group were of the opinion that it has not been conclusively established that Ontario environmental legislation imposes a joint and several regime since it is not explicitly stated in legislation. In addition, some members of the Working Group stated that they oppose joint and several liability and would prefer allocation of liability proportional to responsibility. Ontario policy and regulation do not currently require mediation to apportion liability. The ENGO members of the committee agree with the concepts of allocation and mediation as long as the regime of joint and several liability is maintained.

Canadian Ministers of the Environment endorsed the May 1993 CCME report entitled *Contaminated Sites Liability* which favours the use of alternative liability allocation mechanisms before resorting to application of joint and several liability. While the range of application varies from province to province, most jurisdictions have not moved from this position since the endorsement of the CCME principles. Consistent with the CCME proposal, some jurisdictions have moved to codify joint and several liability as a last resort for allocating responsibility,

The Working Group recognized that a joint and several liability regime does not mean that a cap for liability cannot be established nor does it mean that the issue of apportioning liability should be ignored. There was general consensus from the Working Group that it may be beneficial to have:

(a) A mechanism for allocating liability among those responsible for clean up of a contaminated property;

(b) Clear rules for the allocation; and,

(c) A mechanism to permit recovery of the appropriate share of costs from those who have not paid.

However, the Working Group recognized that this recommendation would impact upon a larger group of stakeholders than were represented in the Working Group and that this issue be the subject of broader consultation.

3.3 A Registry System for Property

Members of the Working Group agree that it would be desirable to have publicly accessible records which would disclose a comprehensive environmental history

of a site or operation, including Certificates of Approvals, orders and environmental site assessments. However, because the establishment of a registry system could have cost implications and possible impacts on the value of property, discussion should involve other stakeholders who have not participated in the proceedings of the Working Group. The Working Group recommends further consultation on this issue.

3.4 Property

The issue of how to define "property" came up in Working Group discussions. While this definition is relevant to lender liability, it was not possible to resolve the issue within the Working Group and without the views of a broader spectrum of stakeholders. The group discussed whether creditors should be permitted to realize separately on, or otherwise separately deal with, individual parcels of real property that are subject to the same security interest, or on a selection of valuable tangible personal property subject to the same security interest.

On one hand, concern has been raised that, if creditors are permitted to realize separately on individual properties or on a selection of valuable tangible property, the remaining real and personal property that may be contaminated could be abandoned without further remediation. This concern has to be balanced, however, against the need for lenders to secure their loans and for businesses to get financing. Without the right balance, investment chill and abandoned properties may result.

3.5 Recovering and Protecting against future Crown Expenses for Clean-up

Often in emergency situations, MOEE will undertake, at its own cost, actions to contain contamination and prevent hazards. This leads to the issue of whether, and from whom, the Crown should be able to recover the costs. While the Working Group supported Principle #7, that the Crown should be able to recover public expenditures on clean-ups so that there are no wind-fall gains, no consensus was reached as to the appropriate mechanism.

It was recognized that any legislative reforms should ensure that lenders, and others, are not put in a position where they make windfall gains as a result of

environmental clean-ups undertaken by the Crown at public expense. In the first instance MOEE would normally attempt to recover costs from those responsible for the contamination. If that was not possible, MOEE would generally attempt to collect from a current or previous owner. If all attempts fail to recover from those responsible under current legislation, there should be new mechanisms for recovering costs.

Various mechanisms for achieving this principle were discussed by the Working Group. These included the possibility of a lien on property which would take priority over encumbrances and other claims, in effect, a "super-lien". The Canadian *Bankruptcy and Insolvency Act* interferes with legislation providing for such a lien and, if not changed, will have to be considered in formulating any legislative amendments. Legislative amendments would also have to deal with the priority of the lien when the property is sold after proceedings have been commenced to issue an order under the *EPA*, but before the Crown has completed remediation work at the property.

The Working Group also discussed mechanisms to prevent future contamination from falling into the public domain, including mechanisms such as mandatory disclosure of environmental information, the wider use of financial assurance and new market mechanisms available to provide assurance, such as reclamation bonds, performance bonds or insurance policies. The Working Group agreed that there should be broader consultation on this issue.

4.0 CONCLUSIONS

Improving regulatory certainty presents a continuing challenge for the Ministry of Environment and Energy — one which must be addressed through a variety of measures. To date, our efforts have been directed at achieving greater certainty through administrative reform. More prescriptive change to codify the circumstances under which lenders would be liable will require legislative reform.

Achieving greater certainty, by clarifying the liability of lenders under environmental legislation, will achieve a number of benefits. It can lead to fewer abandoned sites in future, improve the investment climate resulting in increased economic activity, reduce urban sprawl into green-field areas, and cut administrative costs while ensuring appropriate environmental protection. It is in this context that we the members of the Working Group make these recommendations to MOEE.

APPENDIX A

MOEE WORKING GROUP ON LENDER LIABILITY

TERMS OF REFERENCE (AUGUST 1993)

Introduction

- The Assistant Deputy Minister, Policy Division, is establishing a small multi-stakeholder Working Group ("Working Group") to develop recommendations for government and industry action on lender liability.

- The membership of the Working Group will include individuals whose knowledge can contribute to the development of practical recommendations for action. Representation is anticipated from: MOEE Policy Development Office (Chair), Legal Services Branch and the Regional Operations Division, as well as the Canadian Bankers Association, Insurance Bureau of Canada, Canadian Bar Association - Ontario Division, Canadian Insolvency Practitioners Association and Association of Receivers and Trustees, Commerce & Industry Insurance Company of Canada, Canadian Manufacturers' Association, Canadian Home Builder's Association, Prospectors and Developers Association, Urban Development Institute, Ministry of Economic Development and Trade, Ministry of Finance, and from Environmental Non-Governmental Organizations.

Objective

- The goal of the Working Group is to achieve general agreement on a code governing the circumstances under which lenders (which are otherwise not potentially responsible persons) might become potentially responsible for environmental clean-up and other obligations arising out of their borrowers' activities or the condition of their borrowers' properties.

Underlying Assumptions

1. The Ministry of Environment and Energy supports the broad approach of potentially responsible parties as recommended in the CCME Contaminated Sites Liability Task Group;

2. Lender liability is an issue in which the private sector, in partnership with government, will be encouraged to implement self-help measures (such as the progressive steps lending institutions presently incorporate in their lending practices to protect the environment) to reduce the incidence of contamination;

3. Any policy proposals developed for or by the Ministry which have broader public policy implications will be subject to further consultation; and,

4. The recommendations should be based on consensus, where possible.

Specific Tasks of the Working Group

To achieve the above objective, the Working Group will examine the following questions, among others:

1. What are the current MOEE and private sector approaches to lender liability?

2. What key factors should be considered in formulating new policy and/or program directions?

3. What progressive strategies or options should be considered and how can they be implemented by all responsible parties?

4. What are the recommendations of the Working Group?

In formulating its proposals, the Working Group will review and build on the work of the CCME Task Group on Contaminated Sites Liability, the work of the Waterfront Regeneration Trust Task Group on Liability and Financing issues, the Green Market Opportunities Program (GMOP) Lender Liability Group as well as those proposals already formulated by diverse stakeholders
(such as ENGO's, bankers and legal professions).

Meetings

- Members are expected to consult and report progress widely with their organizations. If organizations request presentations, their own representative on the Working Group will conduct the presentation, not Ministry staff or other working group members.

- In lieu of participation on the Working Group, the Working Group will consider presentations and submissions by other stakeholders.

Initial Membership MOEE Lender Liability Working Group

Antoinette Wells	Policy Development Branch, MOEE
Katharine Allen	Continental Insurance and Insurance Bureau of Canada
Carol Ann Bartlett	Canadian Bankers Association
Brian Benn	Commerce & Industry Insurance Company of Canada
Joe Castrilli	Canadian Environmental Law Association (CELA)
Glenna Ford	Canadian Institute for Environmental Law and Policy (CIELAP)
Wes Gill	Canadian Imperial Bank of Commerce
Brigitte Goulard	The Trust Companies Association of Canada
Doreen Henley	Canadian Manufacturers Association
Andy Manahan	Ontario Home Builders' Association
John Poos	Canadian Manufacturers Association
Dennis Prince	Prospectors & Developers Ass. of Canada and Ontario Mining Ass.
John Roberts	Ontario Forest Industries Association
Steven Shrybman	Canadian Environmental Law Association (CELA)
Judy Smale	Canadian Petroleum Product Institute
Cathy Spoel	Canadian Bar Association
Sam Steel	Canadian Life and Health Insurance Association
Richard Van Veldhuisen	Urban Development Institute
Mark Winfield	Canadian Institute for Environmental Law and Policy (CIELAP)
Chuck Zizzo	Canadian Insolvency Practitioners Association
Rosanne Hahn	Policy Development Branch, Policy Division, MOEE
Ron Hore	Operations Division, MOEE
Alex Giffen	Operations Division, MOEE
Jim Jackson	Legal Services Branch, MOEE
Jim Levy	Legal Services Branch, MOEE

Final Membership MOEE Lender Liability Working Group

Antoinette Wells (Chair)	Policy Development Branch, MOEE
Katharine M. Allan	Continental Insurance Management Limited
David Armitage	Ontario Federation of Agriculture
Carol Ann Bartlett	Royal Bank of Canada
Brian Benn	Commerce & Industry Insurance Company of Canada
Douglas Bisset	Canadian Imperial Bank of Commerce
Tom Fowle	Royal Bank, Toronto
Brigitte Goulard	Trust Companies Association of Canada
Doreen C. Henley	Canadian Manufacturers' Association
Andy Manahan	Ontario Home Builders' Association
Johannus Poos	Stelco Inc.
Dennis Prince	Falconbridge Limited
John Roberts	Noranda Forest Inc.
Judy Smale	Imperial Oil Limited
Cathy Spoel	Miller Thomson
Sam Steel	Sun Life Assurance Company of Canada
Seymour Trachimovsky	Dupont Canada
Richard Van Veldhuisen	Maple Reinders Environmental Ltd.
Alex Giffen	Toronto Regional Office, Operations Division, MOEE
Jim Jackson	Legal Services Branch, Legal Services, MOEE
Ron Hore	Sudbury Regional Office, Operations Division, MOEE
Sean Southey	Policy Development Branch, Policy Division, MOEE
Tim Gigliotti	Policy Development Branch, Policy Division, MOEE

APPENDIX B

COMPREHENSIVE LISTING OF ACTIVITIES NORMALLY UNDERTAKE BY SECURED CREDITORS

During discussions on Principles 3 and 4 in Section 2.1 of the main report, the Working Group produced a listing of the types of activities that would normally be undertaken by secured creditors without risk of potential liability.

For the purposes of determining whether a creditor is responsible for environmental problems, a creditor will not be considered to be in "charge, management or control" (or fall within other language in the *EPA* which identifies persons potentially responsible for environmental problems) if the creditor only does certain things which creditors ordinarily do to protect their secured collateral and/or recover on their loan.

These activities would include, but not be limited to:

1. Conduct usual pre-credit or credit renewal due diligence, including requiring environmental inspections and taking measures to ensure compliance with applicable laws (which may include remediation of existing problems);

2. Structure credit to take into consideration environmental credit risk factors, such as by taking other or additional collateral;

3. Extend or refuse credit (or additional credit) on customary credit-worthiness grounds which take into consideration a blend of credit risk factors;

4. Include protective financial and other covenants in loan and security documentation, including representations, warranties, covenants and notice requirements as to environmental compliance and other matters;

5. Have or exercise the authority to take steps to monitor credit quality and collateral value and to protect the credit or collateral, such as by auditing financial records; inspecting records of performance or the condition of the business or property; providing insurance or emergency repairs to, or paying taxes on, mortgaged properties when a mortgagor fails to do so; or providing security or paying to maintain utilities;

6. Restructure or renegotiate credit or security structure, whether in ordinary circumstances or in a workout, including by requiring additional consideration, or engage in other activities with a borrower designed to prevent or cure default;

7. Provide specific or general financial or other advice, suggestions, counselling or guidance;

8. Participate only in purely financial matters related to the site;

9. Have the capacity or ability under the terms of their security to influence operations at a contaminated site, but do not exercise that capacity or ability in such a way as to cause contamination;

10. Impose requirements on any person if the requirements do not have a reasonable probability of causing contamination at a site;

11. Appoint a person to inspect or investigate a contaminated site to determine future steps or actions that a creditor, trustee or fiduciary might take;

12. Impose requirements to comply with environmental laws, standards, policies or codes of practice of government or industry, including requirements to perform monitoring test or scientific studies or to remediate contaminated sites;

13. Foreclose or otherwise take control of a property or business for a limited period (not to exceed 12 months without the approval of the Director) and for the specific purpose of taking reasonable steps to dispose of the property in order to recover on loans. (Similar rules as those found in U.S. EPA's Final Rule - Lender Liability Under CERCLA regarding foreclosure and post-foreclosure activities would apply. These rules include, for example, the obligation not to refuse any reasonable offers from prospective purchasers of the property. See 57 Fed. Reg. 83, 18384 (April 29, 1992)); or,

14. Enter on real property only for the purpose of realizing on personal property (this only applies with respect to responsibility for existing contamination of the real property).

The above list contains general phrases such as "other activities". These phrases would have to be made more specific if incorporated into legislation to ensure that the provisions are not unintentionally broad or narrow.